U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

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OALJ Case No.: 2008-TLC-00028
ETA Case No.: A-08114-06729

In the Matter of

BOLTON SPRING FARM,
Employer.

Certifying Officer: Renata Jones Adjibodou
Atlanta Processing Center

Appearances: Monte B. Lake, Esquire
Wendel V. Hall, Esquire
Siff & Lake, LLP
Washington, DC
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
R. Peter Nessen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

BEFORE: **JOHN M. VITTONE**
Chief Administrative Law Judge

DECISION AND ORDER

On May 6, 2008, the Office of Administrative Law Judges (OALJ) received the Employer's request for expedited administrative review regarding the denial of its H-2A application for temporary alien labor certification in the above-referenced matter. *See* 20 C.F.R. Part 655, Subpart B. In an administrative review case, the judge's scope of review is limited to

a check for legal sufficiency. The ALJ has only five days from the receipt of the Administrative Record to render a decision.

In the instant case, the only issue on appeal is whether a petitioning employer is required to provide a Spanish translation of the job description on Form ETA 790, Item 10a.

Requirement that Application Be Completed on ETA Forms

The regulation at 20 C.F.R. § 655.101(b) states that "[e]ach H-2A application shall be on a form or forms prescribed by ETA." When applying for H-2A temporary labor certification, an employer must complete both an ETA Form 750 – which is the application for certification – and ETA Form 790 (Agricultural and Food Processing Clearance Order) – which is required for the positive recruitment supporting the labor certification application.

When the Employment and Training Administration (ETA) proposes to implement a form, it must publish a "Proposed Information Request" notice in the Federal Register in order to obtain comments from the public and other government agencies and to obtain clearance from the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. OMB approved Form 790 has been around for many years. The version contained in the H-2A Program Handbook 398, for example, is dated January 1981.

The requirement of a bilingual English/Spanish Form 790, was introduced when the ETA sought comments on a revised Form 790 in the Federal Register in 2004. That notice stated, in pertinent part:

> I. Background
>
> ETA regulations at 20 CFR 653.500 established procedures for the recruitment of agricultural workers. In situations where an adequate supply of workers does not exist in the local recruiting area, out-of-area recruitment can be attempted. In order to initiate out-of-area recruitment for temporary agricultural work, agricultural employers must use the Agricultural and Food Processing Clearance Order, ETA Form 790, if they wish to list the job opening with the State Workforce Agencies (SWAs). ….

II. Desired Focus of Comments

> Currently, ETA is soliciting comments concerning the proposed two-year extension and change of the Agricultural and Food Processing Clearance Order, ETA Form 790, and the Agricultural and Food Processing Clearance Memorandum, ETA Form 795, from the current end date of June 30, 2004, to a new end date of June 30, 2006. **Changes are proposed for both forms, particularly the Agricultural Food Processing Clearance Order, ETA Form 790. Both forms will be produced in a bilingual, English-Spanish format.** The Agricultural Food Processing Clearance Order, ETA Form 790 will be lengthened slightly to include a number of items required by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1800 et seq. These items will provide workers with needed specifics surrounding a job prior to considering employment outside of their commuting area (i.e., Workers Compensation Insurance information, the availability of Unemployment Compensation Insurance coverage, the existence of a work stoppage, etc.). These items are replicated from the Worker Information--Terms and Conditions of Employment, Wage & Hour Form 516. By adding these items to the Agricultural Food Processing Clearance Order, ETA Form 790, agricultural employers will satisfy their disclosure requirements without also having to fill out the Worker Information--Terms and Conditions of Employment, Wage & Hour Form 516. **This will ensure that workers receive full disclosure of required terms and conditions of employment in an appropriate language prior to traveling out of their commuting area.**

69 Fed. Reg. 21578 (Apr. 21, 2004) (emphasis added).[1] Thus, ETA put the public on notice in 2004 that it would be revising Form 790 in a bilingual format, and that the purpose of that revision would be to ensure that workers will receive a full disclosure of required terms and conditions of employment "in an appropriate language."

The current version of Form 790 is bilingual in structure. Moreover, it very clearly states on its face at Box 10a that a "Summary of Material Job Specifications in SPANISH must be included inside this box." The instructions for Form 790 very clearly state that Box 10a must provide in Spanish the same detailed summary of the job duties that were placed in English in Box 10.

[1] ETA published a Federal Register notice in 2006, extending the revised Form 790 without additional change through June 30, 2009. 71 Fed. Reg. 13632 (Mar. 16, 2006).

Thus, ETA's Form 790 is unambiguously a form prescribed by ETA and required to support an H-2A temporary labor certification application, was properly noticed in the Federal Register for public comment and OMB clearance, and was modified in 2004 to employ an English/Spanish language format.

The Employer's arguments on appeal

In the instant case, the Employer did not provide a Spanish translation for Box 10a on Form 790, and was therefore denied certification by the CO.

On appeal, the Employer first argued that the Employer's agent, the New England Appeal Council (NEAC), had been using the H-2A program since 1943 and in those decades had never previously had applications not accepted by ETA for lack of a Spanish language translation. The Employer argued that ETA had made an abrupt change in policy without advance notice to the regulated community and without a basis in the applicable regulations. The Employer contended that the denial was arbitrary and capricious.

As described above, however, the regulations clearly require an employer to use forms prescribed by ETA, the Form 790 is one of the prescribed forms, that form requires a Spanish translation of the job duties, and ETA provided public notice of the bilingual requirement in the Federal Register in 2004. Thus, the CO's refusal to accept the form without the required translation clearly was not arbitrary or capricious.

The assertion that the NEAC had "decades" of applications approved without Spanish translation of job duties is largely explained by the fact that the translation was not an element of the form until 2004. Moreover, as the Board of Alien Labor Certification has held in the context of permanent labor certification applications, submission of another employer's approved application does not set any precedent to which the CO is bound. *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995). Thus, even if the CO approved applications filed after the 2004 revision by the Employer or its agent without the required Spanish translation (which the CO

declined to admit in her appellate brief), that action would not have estopped the CO from raising the omission as a defect in the current application.

The Employer's second argument on appeal is that 20 C.F.R. § 653.501(h), makes translation the responsibility of the SWA because that regulation directs that Spanish/English bilingual staff in offices designated as significant Migrant and Seasonal Farm Workers (MSFW) bilingual offices assist agricultural workers, upon request, in understanding terms and conditions of job orders.

As the CO noted in her brief, however, this regulation "does not require the local job service offices to translate, but only to have staff that can aid agricultural workers to better understand the job offers." Moreover, the regulation only applies to offices that have been designated as "significant MSFW" bilingual offices, and only places the burden on assisting workers "upon request." The Employer's argument that it could not foresee all of the possible destinations of its job offer once it hits the interstate clearance system, and thus by implication the job offer might need to be in many different languages or dialects, is a non sequitur. The form in question only requires a Spanish translation.

Conclusion

Based on the record presented, I find that the CO's decision to decline Bolton Spring Farms' application for temporary alien labor certification was legally sufficient. Accordingly, the CO's April 29, 2008 determination letter is hereby **AFFIRMED**.

A

JOHN M. VITTONE
Chief Administrative Law Judge